

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGEMENT

<b>Case Title:</b> <i>Fillemon Natangwe v The State</i>	<b>Case No.:</b> HC-NLD-CRI-APP-CAL-2020/00052
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Ms. Justice Salionga J et Honourable Mr. Justice Small AJ	<b>Heard on :</b> 08 December 2020 <b>Delivered on:</b> 04 February 2021
<b>Neutral citation:</b> <i>Natangwe v S</i> (HC-NLD-CRI-APP-CAL-2020/00052) [2021] NAHCNLD 11 (04 February 2021)	
<b>IT IS ORDERED THAT:</b>  <ol style="list-style-type: none"><li>1. The appeal partly succeeds.</li><li>2. The conviction of dealing in cannabis is set aside and substituted with a conviction of possession of cannabis in contravening s 2(b) of Act 41 of 1971.</li><li>3. The sentence of 24 months imprisonment is confirmed.</li></ol>	

**Reasons:**

SALIONGA J (Small AJ concurring);

[1] Appellant and accused one (now deceased) were charged with contravening section 2(a) of Act 41 of 1971; Dealing in a prohibited dependence-producing drug alternatively possession of a prohibited dependence producing drug. At the commencement of the trial accused one passed on and the charges were withdrawn against her. The matter proceeded against accused two. He pleaded not guilty to both main and alternative counts. After the evidence was led the magistrate relying on the s 10 presumption under the Act convicted the accused of dealing in cannabis and subsequently sentenced him to 24 months imprisonment.

[2] Dissatisfied with both conviction and sentence imposed, the appellant filed a notice of appeal. Although the appellant appealed against both the conviction and sentence the grounds and arguments raised lean more towards sentence. For good measure he also appealed against a fine, even though no fine was imposed. Counsel for the respondent in the heads of argument submitted that, the conviction on the charge of contravening section 2 (a) of the Act is flawed in that the magistrate relied on the presumption without cautioning the appellant against such. Counsel further submitted that this court is bound to set aside the conviction of dealing and substitute it with possession of cannabis. With regard to appeal against sentence counsel submitted that a sentence of 24 months imprisonment of which 12 months are suspended for that period will be an appropriate sentence in the circumstances.

[3] While perusing the record in preparation of the judgement it became obvious that the State led evidence of two witnesses. They testified that they searched the accused as well as his stand and found nothing. Thereafter accused took them to his room. They further testified that they knew it was accused's room because he led them and opened the door with the key. In the process of searching they lifted the mattress and found the transparent packets between the mattress and the bed. At that moment, accused walked outside, ran and fled the scene. They confirmed the content of these packets to be cannabis.

[4] Accused gave evidence and stated that the police came to his house but did not find

anything. They went to the lady's house where cannabis was found. He was not staying at that house and was just informed that cannabis was found. He was later arrested. He did not know why the police claimed it was his cannabis.

[5] The magistrate rightly found the accused's version not possibly reasonably be true and rejected it as false. However in her reason for convicting the accused on dealing in dagga she stated that section 10 of the Act indicates that accused is presumed to be dealing in cannabis if found in possession of more than 115 grams of cannabis and he fails to prove to the contrary. The magistrate further found that the quantity and the manner in which the cannabis was wrapped is clear that accused was dealing in cannabis. It is the reliance on the presumption this court found to be a misdirection.

[6] It is common cause that, the court a quo was dealing with an undefended accused. This court has on numerous occasion held that for a conviction on dealing in cannabis to follow, accused has (in the particulars of the charge) to be informed of the presumption and the contents of the evidence on which the state is intending to rely on.

[7] I respectfully agree with the Court's holding in *S v Kuvare* 1992 NR 7 (HC) that, where an accused is charged with having contravened s 2 (a) of the Act, it is unfair not to inform him in the particulars of the charge that he is presumed to have dealt in dagga because he was in possession of more than 115 grams of dagga as provided in s 10 (1) (a) (i). Furthermore, in such circumstances the accused should be informed by the prosecutor of the presumption and the content of the evidence which he/she intended to lead.

[8] It is trite that 334 grams of cannabis is quite a substantial quantity. However that is not sufficient to warrant a conviction on dealing in cannabis relying solely on the s 10 presumption. In the instant case there is no evidence that cannabis had been packed for sale for the magistrate to form such opinion. Had the accused *in casu* been warned of the presumption created by s 10, the conviction on dealing could not have been faulted. The failure to caution the undefended accused prejudiced him and the magistrate committed an irregularity that vitiating the proceedings.

[9] I am satisfied that the evidence proves the offence of contravening s 2 (b) of the Act;

possession of a prohibited dependence producing substance and the magistrate was correct in rejecting the accused's evidence. Thus the conviction on dealing in prohibited dependence producing substance has in terms of s 322 (1) (b) of Act 51 of 1977 as amended read with s 19 (1) (b) of the High Court Act 16 of 1990 to be set aside and be substituted.

AD sentence:

[10] With regard to the appeal against sentence it is our respective view that the sentence of 24 months imprisonment on dealing in cannabis valued 334 grams is too lenient when regard is had that accused had recently been convicted of possession of cannabis. Accused had not been rehabilitated and his conduct calls for a lengthy custodial sentence. Considering the quantity and the value involved this court will not interfere with the discretion exercised and the appeal stands to fail.

[11] In the result:

1. The appeal partly succeeds.
2. The conviction of dealing in cannabis is set aside and substituted with a conviction of possession of cannabis in contravening of s 2(b) of Act 41 of 1971.
3. The sentence of 24 months imprisonment is confirmed.

<b>Judge(s) signature</b>	<b>Comments:</b>
SALIONGA J	None
SMALL AJ	None
<b>Counsel:</b>	
<b>Appellant</b>	<b>Respondent</b>
Mr F Natangwe Oluno Correctional Facility, Ondangwa	Ms S Petrus Office of the Prosecutor General, Oshakati